

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EARL P. SHANNON and U.S. POSTAL SERVICE,  
POST OFFICE, Coppel, TX

*Docket No. 99-2241; Submitted on the Record;  
Issued May 3, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a recurrence of total disability in 1998 as a result of his accepted employment injuries; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On May 1, 1989 appellant sustained a traumatic injury while in the performance of duty when he slipped in mud while delivering mail. The Office accepted his claim for physical injuries and for neurotic depression. The Office authorized psychotherapy. On or before November 9, 1992 appellant developed an occupational illness while in the performance of duty. The Office accepted this claim for depressive disorder. On April 7, 1994 appellant, then a 44-year-old modified carrier, sustained a traumatic injury when he fell over backward in his chair. The Office accepted his claim for physical injuries and for depression.<sup>1</sup> Appellant received compensation for temporary total disability until he returned to limited duty four hours a day effective August 21, 1994, after which time the Office paid compensation on the periodic rolls for a partial loss of wage-earning capacity.

On March 25, 1998 the Office referred appellant, together with the record and a statement of accepted facts, to Dr. K. James Wagner, an orthopedist. In a report dated April 3, 1998, Dr. Wagner related appellant's history and medical course and his findings on physical and x-ray examination. He diagnosed chronic pain syndrome. Dr. Wagner found that appellant had reached maximum medical improvement from his April 7, 1994 employment injury with little evidence of disabling residuals. His impression was that the chronicity of appellant's problem had put him into a chronic pain syndrome and mentality that should well respond to an interdisciplinary pain management approach that would address psychological components. "In my opinion," Dr. Wagner reported, "[appellant] should be able to work an eight-hour day on the same modified job, given the same restriction provided by [appellant's] attending physician."

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<sup>1</sup> In a prior appeal, the Board found that the Office properly determined that appellant was entitled to an additional schedule award of seven percent for his left lower extremity. Docket No. 96-1388 (issued August 19, 1998).

The Office provided a copy of Dr. Wagner's opinion to Dr. William H. Wisner, appellant's attending orthopedic surgeon, for comment. On July 23, 1998 the Office advised the employing establishment that, if Dr. Wisner responded and disagreed with Dr. Wagner's recommendation, then a conflict of opinion would be resolved by an impartial physician.

On September 16, 1998 Dr. Wisner responded and disagreed with Dr. Wagner's recommendation. He reported that the employing establishment had taken appellant off work as of April 16, 1998<sup>2</sup> and that appellant was not yet capable of going back to work. Dr. Wisner reported findings to support his opinion. He anticipated that appellant would be able to work a full eight hours but did not know when. Dr. Wisner indicated that appellant's work restrictions would remain the same for some time.

On August 31, 1998 Dr. Robert J. Herbert, a Board-certified psychiatrist and Office referral physician, reported that appellant had a depression that met the criteria for major depression, with suicidal and homicidal ideation and some paranoid thinking. He reported his principal diagnosis as major depressive disorder, severe, with mild psychotic features. Dr. Herbert stated:

"Psychological treatment, of a multidisciplinary nature, has been of help to him, he says and Dr. Cohen's report confirms that. It is unfortunate that continued treatment was denied. What would be most helpful, I think, is for that treatment to continue, for the patient to be able to leave the [employing establishment] without abandoning his financial benefits there and to have some retraining and to start on a new direction in life. The likelihood at this point that he can be rehabilitated so as to return to a position with the [employing establishment] is negated by his sense of being disliked, looked down upon and persecuted there."

Responding to questions posed by the Office, Dr. Herbert reported that appellant did have a psychiatric illness that was caused and accelerated by the antagonism between him and his workplace. He completed a work capacity evaluation indicating that appellant could not work eight hours a day but could work up to four hours a day. Dr. Herbert anticipated no increase in the number of hours appellant would be able to work, as there was no significant progress and a sense of discouragement and futility about work at the employing establishment. He reported that appellant saw the employing establishment, his supervisors and fellow employees as being not only unsupportive but also directly hostile and derisive toward him. Dr. Herbert noted chronic musculoskeletal pain secondary to his injuries as other medical factors that needed to be considered in the identification of a position for appellant.

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<sup>2</sup> Appellant was placed on administrative leave for four hours a day while receiving compensation for four hours a day. A fitness-for-duty report dated May 31, 1998 concluded as follows: "[Appellant] is not fit for duty. He is very depressed and quite paranoid. Feeling defeated, hopeless and useless, he angrily blames most of his unhappiness on the [employing establishment]. This man needs help. He could be a danger to himself and others."

On March 19, 1999 appellant wrote to the Office to complain that he had not received compensation since December 1998. He submitted a January 21, 1999 report from his attending Board-certified psychiatrist, Dr. Howard M. Cohen, who reported as follows:

“[Appellant] did make improvements in his ability to tolerate the pain, however he has a number of other problems that continue to need to be addressed. He continues to suffer from post-traumatic stress disorder that is related to his stress from his employment in the [employing establishment] and the severe difficulty he has had navigating the postal system bureaucracy. In addition, [he has] had marked difficulties with the supervisors. Contact with them appears to cause [appellant] to become extremely agitated, anxious and sometimes angry, although he is fearful of these situations. He appears to get angry to the point where he may have destructive ideations. I think it is unreasonable for [appellant] to return to duty at the [employing establishment] he will undoubtedly experience reemergence of his post-traumatic stress disorder symptoms as well as reemergence of the depression that he has fought so long to be able to treat.”

In a decision dated May 17, 1999, the Office denied compensation for total disability.

On June 9, 1999 appellant requested reconsideration. In a decision dated June 29, 1999, the Office denied a merit review of appellant’s claim.

The Board finds that this case is not in posture for decision. There are unresolved conflicts in medical opinion necessitating a referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work.<sup>3</sup>

In 1998, while receiving compensation for a partial loss of wage-earning capacity, appellant was taken off work by the employing establishment and put on administrative leave. Dr. Wagner, the Office referral orthopedist, reported on April 3, 1998 appellant should be able to work eight hours a day in the same modified job and given the same restrictions provided by appellant’s attending physician. Appellant’s attending orthopedic surgeon, Dr. Wisner, disagreed. He reported on September 16, 1998 that appellant was incapable of going back to work. A conflict thereby arose whether appellant was totally disabled from an orthopedic perspective from his modified position.

A second conflict in medical opinion arose in the psychiatric arena. On August 31, 1998 Dr. Herbert, the Office referral psychiatrist, reported that appellant was capable of working four

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<sup>3</sup> See *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

hours a day, though the likelihood that appellant could be rehabilitated so as to return to a position with the employing establishment<sup>4</sup> was negated by appellant's sense of being disliked, looked down upon and persecuted there. Dr. Herbert reiterated this thought on appellant's work capacity evaluation, wherein he anticipated no increase in the number of hours appellant would be able to work given the lack of significant progress and a sense of discouragement and futility about working at the employing establishment.

Appellant's attending psychiatrist, Dr. Cohen, disagreed. He reported on January 21, 1999 that appellant continued to suffer from post-traumatic stress disorder related to his federal employment. He reported that it was unreasonable for appellant to return to duty, as he would undoubtedly experience a reemergence of his post-traumatic stress disorder symptoms as well as a reemergence of his depression. A conflict thereby arose whether appellant was totally disabled from a psychiatric perspective from his modified position.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>5</sup>

To resolve the conflict between Drs. Wagner, Wisner, Herbert, and Cohen, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist or specialists for a well-reasoned opinion on whether appellant sustained a recurrence of total disability in 1998 as a result of his accepted employment injuries. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation for wage loss.

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<sup>4</sup> By this it appears Dr. Herbert meant a full-time regular position, as he reported that appellant was capable of working four hours a day.

<sup>5</sup> 5 U.S.C. § 8123(a).

The May 17, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.<sup>6</sup>

Dated, Washington, DC  
May 3, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> Whether the Office properly denied appellant's June 9, 1999 request for reconsideration is moot.